(2)

No. 06-482

In the Supreme Court of the United States

HONEYVILLE GRAIN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Assistant General Counsel

DAVID HABENSTREIT
Supervisory Attorney

JEFF BARHAM
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board has reasonably concluded that it will not invalidate a representation election based on isolated religious remarks made during the election campaign unless the party challenging the election proves that the remarks were either inflammatory or a central theme of the campaign.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Arlington Hotel Co. v. *NLRB*, 712 F.2d 333 (8th Cir. 1983) 2
Case Farms of N. C., Inc. v. *NLRB*, 128 F.3d 841 (4th Cir. 1997), cert. denied, 523 U.S. 1077 (1998) 2, 10
Catherine's, Inc., 316 N.L.R.B. 186 (1995) 11
KI (USA) Corp. v. *NLRB*, 35 F.3d 256 (6th Cir. 1994) 7, 8
M & M Supermkts., Inc. v. *NLRB*, 818 F.2d 1567 (11th Cir. 1987) 8, 9
NLRB v. *A. J. Tower Co.*, 329 U.S. 324 (1946) 11
NLRB v. *Bancroft Mfg. Co.*, 516 F.2d 436 (5th Cir. 1975), cert. denied, 424 U.S. 914 (1976) 3
NLRB v. *Dixon Indus., Inc.*, 700 F.2d 595 (10th Cir. 1983) 8
NLRB v. *Flambeau Airmold Corp.*, 178 F.3d 705 (4th Cir. 1999) 8
NLRB v. *Katz*, 701 F.2d 703 (7th Cir. 1983) 9, 10
NLRB v. *Mattison Mach. Works*, 365 U.S. 123 (1961) ... 8

Cases—Continued Page

NLRB v. *Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir. 1966) 10

NLRB v. *Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981) 8, 9

NLRB v. *Sumter Plywood Corp.*, 535 F.2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977) ... 7, 8

Peerless of Am., Inc. v. *NLRB*, 576 F.2d 119 (7th Cir. 1978), overruled in part on other grounds, *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983) 7

Sewell Mfg. Co., 138 N.L.R.B. 66 (1962) 2, 4, 10, 12

State Bank of India v. *NLRB*, 808 F.2d 526 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) 2, 9

Uniroyal Tech. Corp. v. *NLRB*, 98 F.3d 993 (7th Cir. 1996) 8

YKK (U.S.A.), Inc., 269 N.L.R.B. 82 (1984) 2

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8(a)(1), 29 U.S.C. 158(a)(1) 5

§ 8(a)(5), 29 U.S.C. 158(a)(5) 5

In the Supreme Court of the United States

No. 06-482

HONEYVILLE GRAIN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 444 F.3d 1269. The decision and order of the National Labor Relations Board (Pet. App. 26a-35a) is reported at 342 N.L.R.B. No. 61. The Board's underlying decision and certification of representative (Pet. App. 36a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2006. A petition for rehearing was denied on July 6, 2006 (Pet. App. 47a). The petition for a writ of certiorari was filed on October 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962), the National Labor Relations Board (Board or NLRB) announced that it would set aside representation elections where a party "deliberately seek[s] to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." *Id.* at 71-72. Pursuant to that policy, the Board has set aside elections because of inflammatory appeals to racial, religious, or ethnic bigotry. See, *e.g.*, *YKK (U.S.A.), Inc.*, 269 N.L.R.B. 82, 84 (1984) (union mounted virulent and sustained anti-Japanese campaign).

In the Board's view, however, not all references to racial or religious issues warrant invalidation of election results, because election standards cannot be set "so high that for practical purposes elections could not effectively be conducted." *Sewell*, 138 N.L.R.B. at 70. The Board therefore does not set aside elections on the basis of remarks that are not inflammatory or do not represent a central theme of the election campaign. See, *e.g.*, *id.* at 70-71 (distinguishing a "deliberate, sustained appeal to racial prejudice" from a "single, casual" reference); *Case Farms of N.C., Inc.* v. *NLRB*, 128 F.3d 841, 845 (4th Cir. 1997) (racial or ethnic appeals violate *Sewell* only if they are inflammatory or form the core of the campaign), cert. denied, 523 U.S. 1077 (1998); *State Bank of India* v. *NLRB*, 808 F.2d 526, 542 (7th Cir. 1986) (racial remark did not invalidate election because it was "isolated" and not "sufficiently close to the core theme of the campaign"), cert. denied, 483 U.S. 1005 (1987); *Arlington Hotel Co.* v. *NLRB*, 712 F.2d 333, 337-338 (8th Cir. 1983) (isolated comparisons of a manager to Hitler and of the workplace to a slave ship were not

inflammatory); *NLRB* v. *Bancroft Mfg. Co.*, 516 F.2d 436, 443 (5th Cir. 1975) (campaign was oriented around economic issues despite racial remarks), cert. denied, 424 U.S. 914 (1976).

2. Petitioner Honeyville Grain, Inc., processes and distributes food products. Petitioner operates a fleet of trucks from its facility in Rancho Cucamonga, California. In February 2002, the International Brotherhood of Teamsters, AFL-CIO (Union) filed a petition to represent all full-time and regular part-time drivers employed by petitioner at that facility. Pursuant to a decision and direction of election, the Board conducted a secret ballot election among eligible employees. The Union won the election by a vote of 23 to 7, with 2 challenged ballots. Pet. App. 2a.

Petitioner filed objections to the election. As relevant here, petitioner contended that the election should be invalidated because the Union made impermissible appeals to religious prejudice during the election campaign. At a hearing to review the objection, evidence was adduced that, at one meeting shortly before the election, two union agents stated that petitioner was run by Mormons; that petitioner gave money to the Mormon Church; that companies have tax incentives to give profits to churches, when those profits should instead be shared with the workers; that petitioner's Mormon owners also gave money to Mormon missionaries; and that Mormons are missionaries, and missionaries speak good Spanish. Pet. App. 3a, 38a. The Board's hearing officer recommended that the Board overrule petitioner's objection and certify the Union as the employees' bargaining representative. *Id.* at 36a-37a.

The Board adopted the hearing officer's findings and recommendations and certified the Union as the exclu-

sive collective-bargaining representative of the employees. Pet. App. 6a, 36a-46a. Quoting *Sewell*, the Board stated that the "ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election." *Id.* at 39a (quoting 138 N.L.R.B. at 71). The Board rejected petitioner's argument that an election should be set aside unless the party making the religious reference shows that the remarks were germane and truthful. Noting that *Sewell* distinguished between "sustained deliberate, calculated appeals to racial prejudice (as in that case) and isolated, casual remarks appealing to prejudice," the Board stated that it "has consistently refused to overturn elections on the basis of comments with racial or religious overtones, even when they were inaccurate or gratuitous, when the comments were not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious[] prejudices of eligible voters." *Id.* at 40a.

Applying those principles, the Board found that petitioner had "failed to demonstrate that the [Union's] conduct amounted to a sustained inflammatory appeal or a systematic attempt to inject religious issues into the campaign." Pet. App. 41a (internal quotation marks omitted). In reaching that conclusion, the Board considered that the comments were made at only one of approximately 10 union meetings, and that there was no evidence of any other injection of religious comment into the campaign, or of any preexisting religious tension in the workplace. Accordingly, the Board determined, religion was "neither the core nor the theme of the campaign." *Ibid.* Further, the Board found, the evidence did not demonstrate the existence of a "calculated at-

tempt to so inflame religious prejudice that the employees would vote against [petitioner] on religious grounds alone." *Ibid.* Because petitioner "failed to demonstrate that the [Union], through its preelection conduct, overstressed and exacerbated racial or religious feelings through a deliberate appeal to prejudice," the Board declined to set aside the election. *Id.* at 42a.

Petitioner, citing its disagreement with the Board's refusal to set aside the election, refused the Union's subsequent request for bargaining. Pet. App. 6a-7a. The Union filed an unfair labor practice charge, and the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 26a. Finding that all issues relevant to the unfair labor practice complaint were or could have been litigated in the representation proceeding, the Board granted the General Counsel's motion for summary judgment, found that petitioner's refusal to bargain with the Union violated the Act, and ordered petitioner to bargain with the Union. *Id.* at 26a-35a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-25a. The court concluded that the Board, in accordance with *Sewell* and its progeny, correctly placed the initial burden on petitioner to show that the remarks to which it objected were inflammatory or formed the core of the Union's campaign. The court declined to adopt petitioner's proposed "per se rule" that an election should be set aside if the party making the religious statement fails to prove, as an initial matter, that its statements were germane and not inflammatory. *Id.* at 10a. The court noted that no Board or appellate authority supported petitioner's argument and that the Board's "framework accords with other circuits

that have explicitly discussed a party's initial burden when challenging pre-election racial and religious remarks." *Id.* at 11a.

Having determined that the Board correctly placed the initial burden of proof on petitioner, the court held that substantial evidence supported the Board's finding that the religious remarks were neither inflammatory nor the central theme of the Union's campaign. Pet. App. 11a. The court found that the comments "did not explicitly disparage Mormons or reference the owners' religion in an overtly abusive or gratuitous manner;" nor, in contrast to cases in which elections have been set aside, did the speakers "employ vulgarity or profanity to signal that [petitioner's] owners deserved particular disdain." *Id.* at 16a. The court further agreed with the Board that the references to Mormonism were outside of the core issues of the campaign, that there was no evidence of preelection religious tension, and that the remarks were made at only one of approximately 10 meetings during the course of an extended campaign. *Id.* at 18a-19a.

Judge Kelly, dissenting, disagreed with the Board's factual conclusion and would have found that the Union's religious remarks were inflammatory. Pet. App. 21a-24a. The dissent did not disagree, however, with the general burden-shifting approach adopted by the majority. See *ibid.*

The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 47a. Judge Kelly voted to grant panel rehearing, to the extent that the petition for rehearing en banc could be read to include such a request. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner contends (Pet. 2, 5-8) that this Court's review is needed to resolve a conflict between the decision below, which holds that the party challenging an election has the burden of showing that preelection racial or religious remarks were inflammatory or formed the core of the election campaign, and decisions of four other courts of appeals. According to petitioner, those other courts require the election to be set aside unless the party that made the remarks initially establishes that they were germane to legitimate election issues. Petitioner is incorrect, and there is no conflict.

a. As the court below correctly observed, those courts that have addressed the issue raised by petitioner have "followed a general burden-shifting regime" that requires "a party challenging a representative election first to demonstrate that the religious remarks were inflammatory or formed the core of the campaign." Pet. App. 10a-12a (citing *Case Farms of N.C., Inc.* v. *NLRB*, 128 F.3d 841, 845 (4th Cir. 1997), cert. denied, 523 U.S. 1077 (1998); *NLRB* v. *Sumter Plywood Corp.*, 535 F.2d 917, 925 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977); *Peerless of Am., Inc.* v. *NLRB*, 576 F.2d 119, 125 (7th Cir. 1978), overruled in part on other grounds, *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983); *KI (USA) Corp.* v. *NLRB*, 35 F.3d 256, 260 (6th Cir. 1994)). Only then does the burden shift to the party that made the remarks to establish that they were truthful and

germane. See *Sumter Plywood Corp.*, 535 F.2d at 925; *KI (USA) Corp.*, 35 F.3d at 260.

That approach accords with the long-established principle that the party challenging the results of a representation election bears a heavy burden to demonstrate that the election should be set aside, because there is a "presumption that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees." *NLRB* v. *Dixon Indus., Inc.*, 700 F.2d 595, 599 (10th Cir. 1983); see *NLRB* v. *Mattison Mach. Works*, 365 U.S. 123 (1961). That "heavy burden" applies even when parties allege election interference based on "racial or religious remarks." *M & M Supermkts., Inc.* v. *NLRB*, 818 F.2d 1567, 1573 (11th Cir. 1987); accord *NLRB* v. *Flambeau Airmold Corp.*, 178 F.3d 705, 707-708 (4th Cir. 1999); *Uniroyal Tech. Corp.* v. *NLRB*, 98 F.3d 993, 997-998 (7th Cir. 1996).

b. The cases cited by petitioner (Pet. 2, 5-7) do not conflict with the decision below. The court of appeals expressly addressed the case on which petitioner principally relies, *NLRB* v. *Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), and correctly explained that *Silverman's* is consistent with the approach followed below. Relying on the same passage quoted by petitioner (Pet. 6), the court of appeals noted that the *Silverman's* court first concluded that the alleged improper remark—which explicitly disparaged the employer's religion—fell within the *Sewell* definition of an inflammatory appeal to prejudice. Pet. App. 11a; see *Silverman's*, 656 F.2d at 58 ("We can see no reason for the remark except to inflame and incite religious or racial tensions."). Only at that point did the court in *Silverman's* conclude that "the burden of establishing

the legitimacy of the remark shifted to the Union." *Ibid.* (quoting *Silverman's*, 656 F.2d at 58). See Pet. App. 16a-17a (explaining why the remark in *Silverman's*, unlike the remark in this case, was inflammatory).

None of the other cases on which petitioner relies addressed the burden-shifting issue. And none of those cases held that an election must be set aside unless the party that made religious or racial remarks carries an initial burden of showing that the remarks were germane to the election. In *M & M Supermarkets* (cited at Pet. 7), the court held that the relevant remarks—which involved a repeated, explicit slur that disparaged the employer because of his religion and an insinuation of racial prejudice—were "so inflammatory and derogatory that they inflamed racial and religious tensions" against the employer's owner. 818 F.2d at 1573. Nothing in the court's opinion suggests that it relieved the objecting party of the burden of proving that the racial or religious remarks were inflammatory. Indeed, to the extent that the court addressed the burden of proof at all, it reaffirmed that, even in the context of claimed objectionable religious or racial remarks, the party objecting to the election bears the "heavy burden" of proving prejudice to the fairness of the election. *Ibid.*

Petitioner's reliance (Pet. 6-7) on the Seventh Circuit's decision in *NLRB* v. *Katz*, 701 F.2d 703 (1983), is also mistaken. Petitioner mischaracterizes the decision as holding that the religious remarks were "impermissible, because they were not germane to any legitimate issue in the campaign." Pet. 6. As the Seventh Circuit has subsequently explained, *Katz* turned on the existence of multiple religious and racial "inflammatory appeals," which were "central to the union campaign." *State Bank of India* v. *NLRB*, 808 F.2d 526, 542 (1986),

cert. denied, 483 U.S. 1005 (1987). Thus, the Seventh Circuit found that the union's religious and racial appeals were both inflammatory and at the core of the campaign, as well as irrelevant. And at no point did the court discuss the burden-shifting issue. See *Katz*, 701 F.2d at 706-708.

The Fourth Circuit's decision in *NLRB* v. *Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (1966) (cited at Pet. 7), is similarly inapposite. The court in that case held that a union's racial appeals were "highly inflammatory" and irrelevant, and, like the Seventh and Eleventh Circuits, it did not discuss the burden-shifting issue. 356 F.2d at 678-679. Moreover, the Fourth Circuit's recent comprehensive discussion of the burden-shifting framework shows that it follows the same approach as the court of appeals here. See *Case Farms of N.C., Inc.*, 128 F.3d at 845-846.

c. Petitioner also incorrectly asserts (Pet. 2, 4-5, 8, 9, 11) that the court of appeals' decision conflicts with the Board's decision in *Sewell*. Petitioner contends that *Sewell* establishes a per se rule that "germaneness *must* be considered" and that, "regardless of whether the religious message is inflammatory, if it is not germane it is not permitted." Pet. 5. Petitioner misreads *Sewell*. Although *Sewell* stated that a party that has made an inflammatory religious or racial remark bears the burden of establishing that the message was germane, *Sewell* did not go so far as to establish the per se rule petitioner claims. *Sewell* does not require that all references with racial or religious overtones be excluded from campaigns, but prohibits only appeals to animosity and prejudice that are inflammatory or form the core or theme of a party's campaign. See *Sewell*, 138 N.L.R.B. at 70-71 (recognizing that some appeals to race are an

inevitable part of an election campaign and distinguishing a "deliberate, sustained appeal to racial prejudice" from a "single, casual" reference). As subsequent cases have clarified, and as the Board explained here, the Board will not overturn elections "on the basis of comments with racial or religious[] overtones, even when they were inaccurate or gratuitous, when the comments [a]re not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious prejudices of eligible voters." Pet. App. 40a. See, *e.g.*, *Catherine's, Inc.*, 316 N.L.R.B. 186, 186 (1995) (union's "gratuitous comments" about religion of company's owner and its law firm, while "not germane" to organizing campaign, did not warrant setting aside election, because statements "were isolated and lacked inflammatory appeal").

2. Petitioner also contends that this Court should grant certiorari to make clear that the "rule *should be* that the burden is on the party making use of a racial or religious message to establish that it was germane, and that if that party cannot do so, the election will be set aside." Pet. 11 (emphasis altered). Such a rule would, petitioner asserts, send the "strongest message" that racial and religious statements in an election campaign will not be tolerated. *Ibid.* Petitioner's policy-based argument for a per se rule, which has not been accepted by any court of appeals, does not warrant this Court's review.

Petitioner's argument ignores this Court's longstanding recognition that Congress entrusted the Board "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946). Exercising that broad discretion, the Board has eschewed

the rigid approach embodied in petitioner's proposed per se rule, instead applying a more flexible approach that recognizes the practical realities of representation campaigns and elections. The Board's approach prohibits serious or sustained attempts to exacerbate racial and religious tensions, but avoids setting standards "so high that for practical purposes elections could not effectively be conducted." *Sewell*, 138 N.L.R.B. at 70. The court of appeals correctly determined that the Board's approach is a reasonable exercise of its broad discretion. Petitioner identifies no reason for this Court to review that determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Assistant General Counsel

DAVID HABENSTREIT
Supervisory Attorney

JEFF BARHAM
Attorney
National Labor Relations Board

JANUARY 2007